102. We also disagree with the arguments that the early submission of this TRP information is inconsistent with the streamlined notice provisions; to the contrary, as the statute contemplates, the actual tariff with rates will be filed on 7 - or 15-days' notice. In addition, this submission of TRP information does not impose an unnecessary burden on price cap LECs. LEC are currently required to file TRPs at the time they file their annual access tariffs in order to comply with the cost support requirements of our rules. Early filing of the TRPs, absent rate information, will result in the filing of supporting information at the same time as under current rules, while allowing actual rates to be filed later on 7 or 15 days' notice. Accordingly, we will continue to require price cap LECs to file the TRP for their annual access filing, 90 days prior to July 1 of each year, but rate information need not be included. In view of the volume and complexity of the information submitted in the price cap carriers' TRPs, we conclude that any notice period less than 90 days would be inadequate to allow interested parties to review these filings carefully. Therefore, we reject Sprint's and Ameritech's proposals to file the TRP in 15 days. Finally, we conclude that NYNEX's suggestion to further streamline the annual access filing process is outside the scope of this proceeding. Non-price-cap LECs will be required to file their TRPs at the same time that they file their annual access tariffs. The notice period for non-price-cap annual access filings will be governed by the rules we adopt generally governing LEC streamlined filings. Thus, only annual access filings that solely decrease rates may be filed on 7-days' notice. As stated above, LECs may elect to file under existing rules and, therefore, file their TRPs with annual access tariffs that are filed subject to the applicable notice periods of our rules.

6. Tariff Investigations

a. Background

103. Section 402 of the 1996 Act amends section 204(a) of the Act, effective February 8, 1997, to provide that the Commission shall conclude all hearings initiated under this section within five months after the date the charge, classification, regulation, or practice subject to the hearing becomes effective. Currently, we do not have procedural rules governing tariff investigations; instead, the procedures are established in the orders designating issues for investigation. We solicited comment on whether we should establish procedural rules to expedite the hearing process in light of the shortened period in which the Commission must complete tariff investigations. Specifically, we sought comment on whether we should establish time periods for pleading cycles, and page limits for pleadings and exhibits, and whether we should require the filing of proposed orders. We also noted that, while section 204 investigations may be initiated by the Bureau, they must be terminated by the full Commission under section 5(c) of the Communications Act.[262] We solicited suggestions for reforms that will permit more expeditious termination of tariff investigations,

[262] Section 5(c)(1) provides that we may delegate any of our functions to any employee except for certain designated functions, including proceedings under Section 204(a)(2) (tariff investigations).

such as the use of abbreviated orders without extensive findings, especially where we find that the tariff under investigation is lawful. We also solicited comment on whether we can, consistent with section 5(c) of the 1934 Act, as amended, terminate investigations by a pro forma order that adopts a decisional memorandum or order of the Common Carrier Bureau. Finally, we solicited comment on whether we should establish procedures for informal mediation of tariff investigation issues.[263]

b. Comments

104. Ad Hoc, USTA, NECA, Bell Atlantic, US West, and NYNEX support the adoption of procedural rules that would expedite the completion of tariff investigations within the five-month statutory deadline.[264] NECA and Bell Atlantic support the use of abbreviated orders where we make a finding that a tariff is lawful. NYNEX proposed that we adopt the following filing schedule for investigations, calculated from the tariff's effective date: 21 days for the LECs to file the direct case; 35 days for comments/oppositions to the direct case; and 49 days for replies. Under this schedule, we would have over three months to conclude the investigation.[265] MCI favors the establishment of time periods for pleading cycles and page limits in the designation order. In addition, MCI suggests that the designation order could specify that the parties should file proposed orders.[266] CBT, US West, and Ameritech support the use of pro forma orders to terminate investigations. US West supports the use of pro forma orders, provided that they are in fact full Commission determinations of the lawfulness of tariffs and thus final appealable orders. Ameritech opposes the imposition of mandatory informal mediation.[267]

105. GSA, AT&T, Bell Atlantic, and SWBT do not support the establishment of expedited procedures for investigations.[268] GSA points out that section 204(a)(1) places the burden of proof for any rate changes or revisions on the carriers. In addition, GSA contends that we have the authority to reject a tariff if we find by our investigation that the proposed

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[263] Notice at paras. 32-33.

[264] Ad Hoc Comments at 12; USTA Comments at 14-5; NECA Comments at 6; Bell Atlantic Comments at 9; US West Comments at 20; NYNEX Comments at 27.

[265] NYNEX Comments at 27.

[266] MCI Comments at 29.

[267] CBT Comments at 17; Ameritech Comments at 26; US West Comments at 20.

[268] GSA Comments at 16, AT&T Comments at 19-20; Bell Atlantic Comments at 9; SWBT Comments at 21.

tariff is unjust and unreasonable.[269] AT&T and Bell Atlantic suggest that we maintain our flexibility in conducting investigations so we may tailor procedures according to the requirements of a particular proceeding, rather than commit ourselves to any particular procedural rules.[270]

c. Discussion

106. We agree with the commenters that oppose the establishment of specific rules for expediting tariff investigations at this time. Rather, we will continue to set out procedures in designation orders that best meet the needs of a particular proceeding. We have the discretion, for example, to set page limits, establish pleading cycles, or use pro forma designation orders. We find that retaining the flexibility to tailor each investigation individually is the best means of ensuring that tariff investigations are completed within the five month time limit. We also intend, to the extent we may do so while giving full consideration to all issues, to use abbreviated orders for terminating tariff investigations, subject to the new requirements of the 1996 Act. We also favor encouraging parties to use informal mediation to resolve tariff disputes, but will not impose such a requirement at this time. Moreover, in order to expedite the tariff review process and ensure that we conclude all tariff investigations within the five month statutory period, we delegate authority to the Chief, Common Carrier Bureau to work within the cost support rules to establish format requirements for cost data that must be submitted by carriers with certain tariffs.
We note that we recently proposed rules to improve the speed and effectiveness of the formal complaint process.[271] In constrast to formal complaints, we can better provide for expedited tariff investigations by establishing procedural requirements on a case-by-case basis because those requirements can be closely tailored to the issues that have been revealed in the tariff review process.

7. Notice Requirements

107. Existing rules specifying notice periods for LEC tariffs must be amended to conform to the streamlined notice periods for LEC tariffs established in section 204(a)(3). For example, section 61.58 of our rules specifies the notice requirements for dominant carriers before new tariff proposals can go into effect.[272] In particular, section 61.58 states that

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[269] GSA Comments at 16.

[270] Bell Atlantic Comments at 9; AT&T Comments at 19-20.

[271] *See Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Notice of Proposed Rulemaking, CC Docket No. 96-238, FCC 96-460 (rel. November 27, 1996) (*Complaint NPRM*).

[272] 47 C.F.R. § 61.58.

carriers subject to rate-of-return regulation must file a tariff on either 15-, 35-, or 45-days' notice, depending on the type of tariff at issue.[273] Section 61.58(e) states that carriers subject to optional incentive regulation pursuant to section 61.50 of our rules must file a tariff on either 15- or 90-days' notice, depending on the type of tariff at issue.[274] Finally, section 61.58(c)[275] states that carriers subject to price cap regulation must file a tariff on either 14-, 45- or 120-days' notice, depending on the type of tariff change.[276] Therefore, in the Notice we proposed to change section 61.58 of the Commission's existing rules governing notice periods for LEC tariff filings to make this section consistent with the streamlined notice periods of 7 and 15 days required by the 1996 Act.[277] The few comments filed regarding this section of the rules support our proposal.[278] Accordingly, we are amending section 61.58 of the rules to establish notice periods consistent with the 1996 Act.

IV. EFFECTIVE DATE

108. Section 402(b)(4) of the 1996 Act provides that the LEC tariff streamlining provisions shall apply to any charge, classification, regulation, or practice filed on or after one year after the effective date of the 1996 Act, *i.e.*, February 8, 1997. Section 553(d) of the Administrative Procedure Act (APA) provides that the required publication in the Federal Register of changes to the Code of Federal Regulations shall not be made less than thirty days before the effective date except, *inter alia*, as otherwise provided by the agency for good cause found and published with the rule. [279] We find that it is necessary for our rules implementing the LEC streamlined tariff provisions of the 1996 Act to be effective at the time those statutory provisions become effective. Section 402(b)(4) of the 1996 Act is self-effectuating and will become effective on February 8, 1997, regardless of whether the rules adopted in this proceeding have become effective. Making these rules effective by February 8, 1997 will assist parties in complying with the LEC tariff streamlining provisions of the 1996 Act and will avoid possible confusion to LECs and their customers that could result if the Commission's existing LEC tariffing rules remain in effect after February 8, 1997. This constitutes good cause for making these rules effective earlier than thirty days prior to their

[273] *See id.* § 61.58(d).

[274] *Id.* § 61.58(e).

[275] *Id.* § 61.58(c).

[276] *Id.*

[277] Notice at para. 34.

[278] SWBT Comments at 21; CBT Comments at 17.

[279] 5 U.S.C. Section 553(d).

publication in the Federal Register. We note as well, that much of this order is devoted to interpretation of the statute and promulgation of procedural rules, subject matters that are not subject to the thirty day period mandated by section 553(d) of the APA. Accordingly, we are making the rules adopted in this proceeding effective February 8, 1997.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

109. As required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. §603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (Notice) to implement section 402(b)(1)(a) of the Telecommunications Act of 1996, which provides for streamlined tariff filings by local exchange carriers. We sought written public comment on the IRFA proposals in the Notice. Our Final Regulatory Flexibility Analysis (FRFA) in this Report and Order conforms to the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).[280] None of the comments specifically addressed IRFA.

110. **Need for and Objectives of the Proposed Rule**: We promulgate the rules in this Report and Order to implement section 204(a) of the Communications Act of 1934, as amended by section 402 of the Telecommunications Act of 1996. Section 402 provides for streamlined tariff filings by local exchange carriers. In accordance with section 204(a), our implementing rules will implement streamlined tariff filing requirements by LECs with the minimum regulatory and administrative burden on telecommunications carriers. The objective of these rules is to "streamline the procedures for revision by local exchange carriers of charges, classifications and practices."[281]

111. **Summary of Significant Issues Raised by the Public Comments In Response to the IRFA:** While none of the commenters specifically addressed the Commission's IRFA, we received several comments regarding the impact that the various alternatives facing the Commission would have on small companies. For instance, with respect to how the Commission should interpret "deemed lawful," commenters including KMC, ACTA, TRA, and SWBT discussed the effect the Commission's decision would have on small entities.[282]

112. With respect to treatment of tariff filings that include both increases and decreases, ALLTEL suggests that small and mid-sized companies be permitted to define rate increases and decreases at the access category level, and CBT suggests that all of the increases

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[280] 5 U.S.C. §§ 601-611. SBREFA was enacted as Subtitle II of the CWAAA is the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).

[281] *See* S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 69 (1996) (joint explanatory statement).

[282] *See*, ¶ 11-17, *infra*.

and decreases in a given transmittal be aggregated with the applicable notice period based on the net change.[283] USTA proposes that the Commission ensure a streamlined approach for small and mid-sized LECs by permitting rate-of-return LECs to define rate increases or decreases at the access category level and file accordingly. USTA also proposes that LECs under Optional Incentive Regulation be permitted to define rate increases at the basket level.[284]

113. We have also received comments from various parties regarding several discrete issues. For example, with respect to electronic filing, USTA states that the Commission must consider the impact on small LECs who may wish to file their own tariffs but do not have the resources to implement electronic filing at this time.[285] Hence, USTA maintains that electronic filing should not be mandatory.[286] Regarding our proposal in the Notice that each LEC submit an analysis accompanying its tariff filing demonstrating that the transmittal is lawful, CBT states that this requirement would have a chilling effect on small and mid-size LECs that are sensitive to increased legal fees.[287] TRA states that facsimile transmissions should be added to hand delivery requirements as a consideration for small carriers with limited budgets.[288]

114. **Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply**: The RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act (SBA), 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.[289] Under the SBA, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA.[290] SBA has defined a small business for Standard Industrial Classification (SIC) category 4813 (Telephone Communications, Except Radiotelephone) to be

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[283] ALLTEL Comments at 6; CBT Comments at 12-13. *See,* discussion at ¶ *63, infra.*

[284] USTA Comments at 11.

[285] *See* discussion at ¶ ¶ 42-46, *infra.*

[286] USTA Comments at 8.

[287] CBT Comments at 11. *See, infra.,* discussion at Section III., D., 3., a.

[288] TRA Comments at 12. *See, infra.,* discussion at Section III., D., 3., a.

[289] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

[290] 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.,* 176 B.R. 82 (N.D. Ga. 1994).

small entities when they have fewer than 1500 employees.[291]

115. *Total Number of Telephone Companies Affected.* Many of the decisions and rules adopted herein may have a significant economic impact on a substantial number of small telephone companies identified by SBA. The United States Bureau of the Census ("the Census Bureau") reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone service, as defined therein, for at least one year.[292] This number contains a variety of different category of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated.[293]

116. Our rules governing the streamlining of the LEC tariff process apply to all LECs. These companies may have fewer than 1,500 employees and thus fall within the SBA's definition of small telecommunications entity, we do not believe that such entities should be considered small entities within the meaning of the RFA. Because the small incumbent LECs subject to these rules are either dominant in their field of operations or are not independently owned and operated, consistent with our prior practices, they are excluded from the definition of "small entity" and "small business concerns."[294] Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs.[295] Out of an abundance of caution, however, for regulatory flexibility analysis purposes, we will consider small incumbent LECs that arguably might be defined by SBA as "small business concerns."

117. *Local Exchange Carriers.* Neither this agency nor SBA has developed a definition of small providers of local exchange service (LECs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[296] The most reliable source of information regarding the

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[291] 13 C.F.R. § 121.201.

[292] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

[293] 15 U.S.C. § 632(a)(1).

[294] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, *supra* at 16144-45 (1996).

[295] *See id.* ¶ 1342.

[296] Standard Industrial Classification (SIC) Code 4813.

number of LECs nationwide of which we are aware appears to be the data that we collect annually in connection with Telecommunications Relay Service (TRS). According to our most recent data, 1,347 companies reported that they were engaged in the provision of local exchange service.[297] Although it seems certain that some of these carriers are not independently owned and operated, or have fewer than 1500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. We conclude that there are fewer than 1,347 small incumbent LECs that may be affected by the proposals in this Report and Order.

118. **Potential Petitioners Subject to 47 C.F.R. 1.773:** Section 1.773 of the Commission's rules apply to any entity who files a petition to suspend or reject a new tariff filing.[298] Petitioners may be other telecommunications businesses, competitors of LECs or end users (i.e., consumers). It is not possible to determine with any specificity the primary field of business of an end user, nor is it possible to determine whether they may be a small entity. Therefore, for purposes of this FRFA, we have included general information about small businesses, small governmental jurisdictions, and small not-for- profit establishments, as well as telecommunications entities as potential petitioners that may be impacted by this R & O. An individual petitioner is not considered a small business under the RFA.[299]

119. *Small Businesses (Workplaces).* Workplaces encompass establishments for profit and nonprofit, plus local, state and federal governmental entities. SBA guidelines to the SBREFA state that about 99.7 percent of all firms are small and have fewer than 500 employees and less than $25 million in sales or assets.[300] There are approximately 6.3 million establishments in the SBA database.[301]

120. *Governmental Jurisdictions.* The definition of a small governmental jurisdiction is one with a population of less than 50,000.[302] There are 85,006 governmental jurisdictions

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[297] Federal Communications Commission, CCB, Industry Analysis Division, *Telecommunications Industry Revenue: TRS Fund Worksheet Data,* Tbl. 21 (Average Total Telecommunications Revenue Reported by Class of Carrier) (Feb. 1996 (*TRS Worksheet*).

[298] 47 C.F.R. § 1.773 (Amendments to the Code of Federal Regulations - Appendix C).

[299] *See* 13 C.F.R. § 601(3).

[300] A Guide to the Regulatory Flexibility Act, U.S. Small Business Administration, Washington D.C., May, 1996, at page 14.

[301] *Id.* at 15.

[302] 13 C.F.R. § 601(5).

in the nation.[303] This number includes such jurisdictions as states, counties, cities, utility districts and school districts. There are no figures available on what portion of this number has populations of fewer than 50,000. However, this number includes 38,978 counties, cities and towns, and of those, 37,566, or 96 percent, have populations of fewer than 50,000.[304] The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental jurisdictions, we estimate that 96 percent, or 81,600, are small jurisdictions.

121. *Small Organizations.* The Commission has not established a definition of small organization therefore, we will use the definition under the RFA. The RFA defines a small organization as any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.[305] There are approximately 257,038 total non-profit organizations in the United States.[306]

122. *Total Number of Telephone Companies Affected. See supra* para. 115.

123. *Local Exchange Carriers. See supra* para. 117.

124. *Interexchange Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 97 companies reported that they were engaged in the provision of interexchange services.[307] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 97 small entity IXCs that may be affected by the decisions and rules adopted in this Order.

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[303] 1992 Census of Governments, Bureau of the Census, U.S. Department of Commerce.

[304] *Id.*

[305] 13 C.F.R. 601(4).

[306] U.S. Small Business Administration 1991 Economic Census Employment Report, Table 5, Bureau of the Census, U.S. Department of Commerce,(enterprises data prepared by the U.S. Census Bureau under contract to the SBA).

[307] *Id.*

125. *Competitive Access Providers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services (CAPs). The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 30 companies reported that they were engaged in the provision of competitive access services.[308] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 30 small entity CAPs.

126. *Wireless (Radiotelephone) Carriers.* SBA has developed a definition of small entities for radiotelephone (wireless) companies (SIC 4812) as an entity with 1,500 or less employees.[309] The Census Bureau reports that there were 1,176 such companies in operation for at least one year at the end of 1992.[310] According to SBA's definition, a small business radiotelephone company is one employing fewer than 1,500 persons.[311] The Census Bureau also reported that 1,164 of those radiotelephone companies had fewer than 1,000 employees. Thus, even if all of the remaining 12 companies had more than 1,500 employees, there would still be 1,164 radiotelephone companies that might qualify as small entities if they are independently owned are operated. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1,164 small entity radiotelephone companies.

127. *Cellular Service Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4812). The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 789 companies reported that they were engaged in the provision of cellular

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[308] *Id.*

[309] 13 C.F.R. § 121.201 (SIC 4812).

[310] United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) (*1992 Census*).

[311] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

services.[312] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 789 small entity cellular service carriers.

128. *Mobile Service Carriers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for radiotelephone (wireless) companies (SIC 4812). The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 117 companies reported that they were engaged in the provision of mobile services.[313] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently, we estimate that there are fewer than 117 small entity mobile service carriers.

129. *Broadband PCS Licensees.* The broadband PCS spectrum is divided into six frequency blocks designated A through F. As set forth in 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years. Our definition of a "small entity" in the context of broadband PCS auctions has been approved by SBA.[314] The Commission has auctioned broadband PCS licenses in Blocks A, B, and C. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. Based on this information, we conclude that the number of broadband PCS licensees affected by the decisions in this Order includes, at a minimum, the 90 winning bidders that qualified as small entities in the Block C broadband PCS auctions.

130. At present, no licenses have been awarded for Blocks D, E, and F of broadband PCS spectrum. Therefore, there are no small businesses currently providing these services. However, a total of 1,479 licenses will be awarded in the D, E, and F Block broadband PCS auctions, which commenced on August 26, 1996. Eligibility for the 493 F Block licenses is

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[312] *Id.*

[313] *Id.*

[314] *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5532, 5581-84 (1994).

limited to entrepreneurs with average gross revenues of less than $125 million.[315] We cannot estimate, however, the number of these licenses that will be won by small entities under our definition, nor how many small entities will win D or E Block licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees[316] and that no reliable estimate of the number of prospective D, E, and F Block licensees can be made, we assume for purposes of this FRFA, that a majority of the licenses in the D, E, and F Block Broadband PCS auctions.

131. *SMR Licensees.* Pursuant to 47 C.F.R. § 90.814(b)(1), the Commission has defined "small entity" in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years.[317] This definition of a "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[318] The rules adopted in this Order may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities.

132. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by the rule adopted in this Order includes these 60 small entities. No auctions have been held for 800 MHz geographic area SMR licenses. Therefore, no small entities currently hold these licenses. A total of 525 licenses will be awarded for the upper 200 channels in the 800 MHz geographic area SMR auction. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800

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[315] *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, *Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*, Report and Order, GN Docket No. 90-314, FCC 96-278 (rel. June 24, 1996).

[316] *1992 Census*, Table 5, Employment Size of Firms: 1992, SIC Code 4812.

[317] *See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463 (1995).

[318] *Id.*

MHz geographic area SMR auction. It is not possible to ascertain how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz licensees can be made, we assume, for purposes of this FRFA, that a majority of the licenses may be awarded to small entities.

133. *Resellers.* Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies (SIC 4812 and 4813 combined). The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the TRS. According to our most recent data, 206 companies reported that they were engaged in the resale of telephone services.[319] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 206 small resellers.

134. **Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:** LECs subject to price cap regulation and LECs that elect to file tariffs subject to price cap regulation will be required to file their tariff review plans (TRP) prior to the filing of their annual tariff revisions. This requirement will not impose a significant burden on the LECs because they currently file TRPs at the time they file their annual access tariffs. Adoption of this proposal will require that the carriers allocate the resources needed to complete the TRPs prior to their filing of the annual access tariffs. In order to comply with this filing requirement, LECs will need to utilize tariff analysts and legal and accounting personnel. LECs have the personnel necessary to meet these requirements since they are already required to utilize staff with skills necessary to establish tariffs that comply with sections 201-205 of the Communications Act. Although this requirement that price cap LECs file their TRP prior to the filing of their annual tariff revisions will establish a new TRP filing deadline, we believe it is justified under the new streamlined tariff filing procedures. To date, we are not aware of any small entities that have elected to be subject to price cap regulation. Therefore, at the time these rules become effective, no small carriers will be required to file their TRPs prior to the filing of their annual tariff revisions. In the future, however, small entities that elect to be subject to price cap regulation pursuant to section 61.41(a)(3) of our rules[320] will be required to comply with this reporting requirement.

135. In addition, our requirement that all petitions and reply pleadings be hand

[319] *Id.*

[320] 47 C.F.R. § 61.41(a)(3).

served or served by facsimile transmission will not impose a significant burden on small entities. Facsimile and hand delivery service are readily available throughout the country for any entities that may not have their own capabilities in these areas.

136. **Significant Alternatives and Steps Taken By Agency to Minimize Significant Economic Impact on a Substantial Number of Small Entities and Small Incumbent LECs Consistent with Stated Objectives**: We believe that our proposed actions to implement the specific streamlining requirements of section 204(a)(3) of the Communications Act, as well as additional steps for streamlining the tariff process, minimize the economic impact on small carriers that are eligible to file tariffs on a streamlined basis. For example, our proposal to establish a program for the electronic filing of tariffs will reduce the existing economic burden on carriers who are now required to file paper tariffs with the Commission.[321] To the extent that specific concerns have been expressed regarding the ability of smaller companies to comply with electronic filing requirements, we conclude that this issue can be addressed by the Bureau in consultation with the industry when establishing the system.

137. Under the new competitive provisions of the 1996 Act, there could be a number of new LECs entering the local exchange market that would be considered small businesses. To the extent that such carriers file tariffs and would be considered non-dominant, we conclude that our rules would not create any additional burdens because under section 63.23(c), 47 C.F.R. § 63.23(c), non-dominant carriers are permitted to file tariffs on one day's notice. Further, our determinations in this proceeding that will apply to such carriers will reduce administrative burdens for these carriers, to the extent they file tariffs pursuant to section 204(a)(3) of the Act.

138. In adopting the first interpretation of "deemed lawful," we have considered the comments of KMC, ACTA, and TRA which expressed a concern that adoption of this interpretation would be unfair to small consumers and competitors of LECs.[322] With respect to KMC's concern that the adoption of the first interpretation would make it difficult for small competitors to challenge LEC tariff filings, as discussed above in Section III., B, all parties, including small entities, will have the same opportunity to challenge tariff filings eligible for streamlined regulation before they become effective or to initiate a section 208 complaint proceeding after the filings become effective. These procedures will permit small businesses to fully participate in pre-effective review of LEC tariffs and to obtain a determination of the lawfulness of a LEC tariff after it has gone into effect. To the extent that small entities will have greater difficulty than larger entities in participating in the tariff review process, we note that the shortened time period for pre-effective review of LEC tariffs

[321] *See, supra.*, discussion at Section III., D., 1.

[322] *See, supra.*, discussion at Section III., B.

is required by the 1996 Act and that, as explained above, we are compelled by the language in the statute as interpreted by relevant judicial precedent to adopt the first interpretation of "deemed lawful." Similarly, as to ACTA's and TRA's concern that the adoption of the first interpretation will adversely affect small carriers and consumers by precluding damages as a remedy for the period that tariffs are effective but have been found unlawful subsequently in a section 205 or 208 proceeding, we are compelled by the language in the statute as interpreted by relevant judicial precedent to adopt the first interpretation of "deemed lawful." Small businesses will be able to protect against this possible impact on them caused by "deemed lawful" treatment of LEC tariffs by participating in the pre-effective tariff review process. Our program of electronic filing of tariffs will facilitate participation of small entities in the tariff review process.

139. In choosing not to impose a requirement that carriers submit an analysis accompanying their tariff filings demonstrating that the filing is lawful, we have addressed the concerns of CBT that this requirement might have a chilling effect on small and mid-size LECs that are sensitive to increased legal fees.[323]

140. Finally, we have addressed the concern expressed by TRA that requiring hand delivery of petitions and replies could be prejudicial to small companies which may not be able to afford such service by adopting TRA's suggestion that facsimile transmission be added as an alternative to required hand delivery.[324]

141. With respect to treatment of tariff filings that include both increases and decreases, we have considered the various alternative suggestions provided by ALLTEL, CBT, and USTA to permit small LECs to aggregate the rate increases and decreases in their filings, and file those with a net rate decrease on 7 days' notice. As stated above, we have rejected these suggestions because we believe that this approach would be contrary to the plain language of the statute which clearly states that the longer, 15 days' notice period will apply "in the case of an increase in rates."[325] Moreover, we have concluded that by requiring tabulation of net increases and decreases, this approach would create confusion and add another step to an already brief review process.

142. **Report to Congress:** The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this Report and Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this FRFA will also be published in the Federal Register.

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[323] *See, supra.*, discussion at Section III., D., 3., a.

[324] *See, supra.*, discussion at Section III., D., 4., c.

[325] 1996 Act, Section 402(b)(1)(A)(iii). *See, supra.*, discussion at Section III., D., 3., c.

VI. FINAL PAPERWORK REDUCTION ANALYSIS

143. On November 27, 1996, the Office of Management and Budget (OMB) approved all of the proposed changes to our information collection requirements in accordance with the Paperwork Reduction Act.[326] We have, however, decided not to adopt several of the information collection requirements proposed in the Notice and we have modified others. For example, we declined to adopt the proposal to require the LECs to include a summary and legal analysis with their tariff filings, but we will require that LEC tariff filings include a statement in tariff transmittal letters clearly indicating that the tariff is being filed on a streamlined basis under section 204(a)(3) of the Act and whether the tariff filing contains a proposed rate increase, decrease or both for purposes of section 204(a)(3).[327] We conclude that these requirements and modifications constitute a new "collection of information," within the meaning of the Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501-3520. These requirements and modifications are subject to OMB review and the Commission has requested emergency approval of these modifications to ensure that the requirements may be effective on February 8, 1997. In addition, we will seek final OMB approval for these modifications.

144. The Commission concurs with OMB's recommendation that we consider input from the industry before implementing a system for the electronic filing of tariffs and related pleadings.

VII. ORDERING CLAUSES

145. Accordingly, IT IS ORDERED that pursuant to authority contained in sections 1,4(i), and 204(a)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 204(a)(3), Parts 1 and 61 of the Commission's rules are Amended as set forth in Appendix B hereto.

146. IT IS FURTHER ORDERED that the policies, rules, and requirements set forth herein ARE ADOPTED.

147. IT IS FURTHER ORDERED that the policies, rules and requirements adopted herein SHALL BE EFFECTIVE February 8, 1997.

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[326] *Notice of Office of Management and Budget Action*, OMB No. 3060-0745 (Nov. 27, 1996).

[327] *See, supra.*, discussion at Section III., D., 3., d.

148. IT IS FURTHER ORDERED that authority is delegated to the Chief, Common Bureau, as set forth *supra.* in paras. 48, 75, and 106.

Federal Communications Commission

William F. Caton
Acting Secretary

Appendix A - List of Parties
(CC Docket No. 96-187)

Comments filed on or before October 9, 1996
in response to Notice of Proposed Rulemaking

Ad Hoc Telecommunications Users Committee
ALLTEL Telephone Services Corporation
America's Carrier Telecommunications Association
Ameritech
AT&T Corp.
Association for Local Telecommunications Services
Bell Atlantic
BellSouth Corp.
Capital Cities/ABC, Inc., CBS, National Broadcasting Company, and Turner Broadcasting System, Inc.
Cincinnati Bell Telephone
Competitive Telecommunications Association
Communications Image Technologies, Inc.
Frontier Corp.
General Services Administration
GTE Services Corp.
KC Telecom, Inc.
MCI Communications Corporation
McLeod Telemanagement, Inc.
MFS Communications Co.
National Exchange Carrier Association
NYNEX Telephone Companies
Pacific Telesis Group
Southwestern Bell Telephone Company
Sprint Corp.
Telecommunications Resellers Association
Time Warner Communications Holdings, Inc.
United States Telephone Association
US West, Inc.

Reply Comments filed
on or before October 24, 1996

Ad Hoc Telecommunications Users Committee
America's Carrier Telecommunication Association
Ameritech
Association of Local Telecommunications Services
AT&T Corp.
Bell Atlantic
BellSouth Corp.
General Services Administration
GTE Services Corp.
KMC Telecom, Inc.
MCI Communications Corporation
McLeod TeleManagement, Inc.
MFS Communications Co.
National Telephone Cooperative Association
NYNEX Telephone Companies
Pacific Telesis Group
Southwestern Bell Telephone Company
Sprint Corp.
Time Warner Communications Holding, Inc.
United States Telephone Association
US West, Inc.

APPENDIX B:

STANDARD PROTECTIVE ORDER AND DECLARATION FOR USE IN SECTION 402(b) STREAMLINED LEC TARIFF PROCEEDINGS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

[Name of Proceeding]) Docket No. __

PROTECTIVE ORDER

This Protective Order is intended to facilitate and expedite the review of documents containing trade secrets and commercial or financial information obtained from a person and privileged or confidential. It reflects the manner in which "Confidential Information," as that term is defined herein, is to be treated. The Order is not intended to constitute a resolution of the merits concerning whether any Confidential Information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

1. Definitions.

a. Authorized Representative. "Authorized Representative" shall have the meaning set forth in Paragraph seven.

b. Commission. "Commission" means the Federal Communications Commission or any arm of the Commission acting pursuant to delegated authority.

c. Confidential Information. "Confidential Information" means (i) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith constitutes trade secrets and commercial or financial information which is privileged or confidential within the meaning of Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4) and (ii) information submitted to the Commission by the Submitting Party that has been so designated by the Submitting Party and which the Submitting Party has determined in good faith falls within the terms of Commission orders designating the items

for treatment as Confidential Information. Confidential Information includes additional copies of, notes, and information derived from Confidential Information.

d. Declaration. "Declaration" means Attachment A to this Protective Order.

e. Reviewing Party. "Reviewing Party" means a person or entity participating in this proceeding or considering in good faith filing a document in this proceeding.

f. Submitting Party. "Submitting Party" means a person or entity that seeks confidential treatment of Confidential Information pursuant to this Protective Order.

2. Claim of Confidentiality. The Submitting Party may designate information as "Confidential Information" consistent with the definition of that term in Paragraph 1 of this Protective Order. The Commission may, *sua sponte* or upon petition, pursuant to 47 C.F.R §§ 0.459 & 0.461, determine that all or part of the information claimed as "Confidential Information" is not entitled to such treatment.

3. Procedures for Claiming Information is Confidential. Confidential Information submitted to the Commission shall be filed under seal and shall bear on the front page in bold print, "CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION - DO NOT RELEASE." Confidential Information shall be segregated by the Submitting Party from all non-confidential information submitted to the Commission. To the extent a document contains both Confidential Information and non-confidential information, the Submitting Party shall designate the specific portions of the document claimed to contain Confidential Information and shall, where feasible, also submit a redacted version not containing Confidential Information.

4. Storage of Confidential Information at the Commission. The Secretary of the Commission or other Commission staff to whom Confidential Information is submitted shall place the Confidential Information in a non-public file. Confidential Information shall be segregated in the files of the Commission, and shall be withheld from inspection by any person not bound by the terms of this Protective Order, unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

5. Access to Confidential Information. Confidential Information shall only be made available to Commission staff, Commission consultants and to counsel to the Reviewing Parties, or if a Reviewing Party has no counsel, to a person designated by the Reviewing Party. Before counsel to a Reviewing Party or such other designated person designated by the Reviewing Party may obtain access to Confidential Information, counsel or such other

designated person must execute the attached Declaration. Consultants under contract to the Commission may obtain access to Confidential Information only if they have signed, as part of their employment contract, a non-disclosure agreement or if they execute the attached Declaration.

6. Counsel to a Reviewing Party or such other person designated pursuant to Paragraph 5 may disclose Confidential Information to other Authorized Representatives to whom disclosure is permitted under the terms of paragraph 7 of this Protective Order only after advising such Authorized Representatives of the terms and obligations of the Order. In addition, before Authorized Representatives may obtain access to Confidential Information, each Authorized Representative must execute the attached Declaration.

7. Authorized Representatives shall be limited to:

a. Counsel for the Reviewing Parties to this proceeding including in-house counsel actively engaged in the conduct of this proceeding and their associated attorneys, paralegals, clerical staff and other employees, to the extent reasonably necessary to render professional services in this proceeding;

b. Specified persons, including employees of the Reviewing Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in this proceeding, except that disclosure to persons in a position to use this information for competitive commercial or business purposes shall be prohibited;

c. Any person designated by the Commission in the public interest, upon such terms as the Commission may deem proper.

8. Inspection of Confidential Information. Confidential Information shall be maintained by a Submitting Party for inspection at two or more locations, at least one of which shall be in Washington, D.C. Inspection shall be carried out by Authorized Representatives upon reasonable notice not to exceed one business day during normal business hours.

9. Copies of Confidential Information. The Submitting Party shall provide a copy of the Confidential Material to Authorized Representatives upon request and may charge a reasonable copying fee not to exceed twenty five cents per page. Authorized Representatives may make additional copies of Confidential Information but only to the extent required and solely for the preparation and use in this proceeding, Authorized Representatives must maintain a written record of any additional copies made and provide this record to the

Submitting Party upon reasonable request. The original copy and all other copies of the Confidential Information shall remain in the care and control of Authorized Representatives at all times. Authorized Representatives having custody of any Confidential Information shall keep the documents properly secured at all times.

10. Filing of Declaration. Counsel for Reviewing Parties shall provide to the Submitting Party and the Commission a copy of the attached Declaration for each Authorized Representative within five (5) business days after the attached Declaration is executed, or by any other deadline that may be prescribed by the Commission.

11. Use of Confidential Information. Confidential Information shall not be used by any person granted access under this Protective Order for any purpose other than for use in this proceeding (including any subsequent administrative or judicial review), shall not be used for competitive business purposes, and shall not be used or disclosed except in accordance with this Order. This shall not preclude the use of any material or information that is in the public domain or has been developed independently by any other person who has not had access to the Confidential Information nor otherwise learned of its contents.

12. Pleadings Using Confidential Information. Submitting Parties and Reviewing Parties may, in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. Any portions of the pleadings that contain or disclose Confidential Information must be physically segregated from the remainder of the pleadings and filed under seal;

b. The portions containing or disclosing Confidential Information must be covered by a separate letter referencing this Protective Order;

c. Each page of any Party's filing that contains or discloses Confidential Information subject to this Order must be clearly marked: "Confidential Information included pursuant to Protective Order, [cite proceeding];" and

d. The confidential portion(s) of the pleading, to the extent they are required to be served, shall be served upon the Secretary of the Commission, the Submitting Party, and those Reviewing Parties that have signed the attached Declaration. Such confidential portions shall be served under seal, and shall not be placed in the Commission's Public File unless the Commission directs otherwise (with notice to the Submitting Party and an opportunity to comment on such proposed disclosure). A Submitting Party or a Reviewing Party filing a pleading

containing Confidential Information shall also file a redacted copy of the pleading containing no Confidential Information, which copy shall be placed in the Commission's public files. A Submitting Party or a Reviewing Party may provide courtesy copies of pleadings containing Confidential Information to Commission staff so long as the notation required by subsection c. of this paragraph is not removed.

13. Violations of Protective Order. Should a Reviewing Party that has properly obtained access to Confidential Information under this Protective Order violate any of its terms, it shall immediately convey that fact to the Commission and to the Submitting Party. Further, should such violation consist of improper disclosure or use of Confidential Information, the violating party shall take all necessary steps to remedy the improper disclosure or use. The Violating Party shall also immediately notify the Commission and the Submitting Party, in writing, of the identity of each party known or reasonably suspected to have obtained the Confidential Information through any such disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this Protective Order, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to Confidential Information in this or any other Commission proceeding. Nothing in this Protective Order shall limit any other rights and remedies available to the Submitting Party at law or equity against any party using Confidential Information in a manner not authorized by this Protective Order.

14. Termination of Proceeding. Within two weeks after final resolution of this proceeding (which includes any administrative or judicial appeals), Authorized Representatives of Reviewing Parties shall destroy or return to the Submitting Party all Confidential Information as well as all copies and derivative materials made, and shall certify in a writing served on the Commission and the Submitting Party that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel to a Reviewing Party may retain two copies of pleadings submitted on behalf of the Reviewing Party. Any confidential information contained in any copies of pleadings retained by counsel to a Reviewing Party or in materials that have been destroyed pursuant to this paragraph shall be protected from disclosure or use indefinitely in accordance with paragraphs 9 and 11 of this Protective Order unless such Confidential Information is released from the restrictions of this Order either through agreement of the parties, or pursuant to the order of the Commission or a court having jurisdiction.

15. No Waiver of Confidentiality. Disclosure of Confidential Information as provided herein shall not be deemed a waiver by the Submitting Party of any privilege or entitlement to confidential treatment of such Confidential Information. Reviewing Parties, by viewing these materials: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other

proceeding; and (c) agree that accidental disclosure of Confidential Information shall not be deemed a waiver of the privilege.

16. Additional Rights Preserved. The entry of this Protective Order is without prejudice to the rights of the Submitting Party to apply for additional or different protection where it is deemed necessary or to the rights of Reviewing Parties to request further or renewed disclosure of Confidential Information.

17. Effect of Protective Order. This Protective Order constitutes an Order of the Commission and an agreement between the Reviewing Party, executing the attached Declaration, and the Submitting Party.

18. Authority. This Protective Order is issued pursuant to Sections 4(i) and 4(j) of the Communications Act as amended, 47 U.S.C. §§ 154(i), (j) and 47 C.F.R. § 0.457(d).